

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

WENDT CORPORATION,)	
)	
Respondent,)	Judge Ira Sandron
)	
and)	Case Nos. 03-CA-212225
)	03-CA-220998
SHOPMEN’S LOCAL UNION NO. 576,)	03-CA-223594
)	
Charging Party.)	

**CHARGING PARTY’S RESPONSE IN OPPOSITION TO
RESPONDENT’S REQUEST FOR SPECIAL PERMISSION TO APPEAL**

On September 28, 2018, Wendt Corporation (the “Company”) filed a request for special permission to appeal Administrative Law Judge Ira Sandron’s decision to permit the General Counsel to amend its complaint at trial. For the reasons stated below, the Company’s request should be denied.

I. Background

Charging Party Shopmen’s Local Union No. 576 (the “Union”) has filed several unfair labor practice charges against the Company. Trial on these charges began during the week of September 10, 2018 and will continue on November 5, 2018.

One charge filed by the Union alleges that the Company unilaterally transferred bargaining unit work by promoting three individuals to the position of working supervisor. The Union maintains that the promotion was a sham because the individuals perform almost exclusively bargaining unit work. On September 13, 2018, Union member Derek Muench testified in support of this charge. Mr. Muench also presented his handwritten notes which document the job duties performed by a working supervisor. (Tr. 709).

Counsel for the Company cross examined Mr. Muench on these notes. Specifically, counsel asked Mr. Muench whether he had taken these notes during work time and the percentage of the notes he had taken during work time. (Tr. 767). Immediately, the General Counsel objected to this line of questioning as a threat to discipline Mr. Muench for taking notes during work time. (Tr. 768). As a result, the General Counsel moved to amend its complaint to include the following allegation: “Respondent, by its unnamed legal representative, threatened an employee with specific reprisals for engaging in union activity.” (Tr. 778). This motion to amend was granted by the Judge Sandron. (Tr. 778).

II. Legal Standard

An administrative law judge has discretion to permit the amendment of a complaint. Under Rule 102.17, a “complaint may be amended upon such terms as may be deemed just...at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, by the Administrative Law Judge...” An administrative law judge has “wide discretion to grant or deny motions to amend a complaint.” See Pincus Elevator & Electric Co., 308 NLRB 684, 685 (1992), enfd. mem. 998 F.2d 1004 (3rd Cir. 1993). See also, e.g., El Paso Healthcare Sys., Ltd., 358 NLRB 460, 461 (2012); Consumers Distrib., 274 NLRB 346 (1985) (denying request for interim appeal of administrative law judge’s ruling under Rule 102.26 because the judge did not act “arbitrarily or capriciously”).

An employer’s threats in retaliation for engaging in protected activity violates the Act. See, e.g., Titus Elec. Contracting, Inc., 355 NLRB 1357, 1386 (2010). Moreover, it is undisputed an employer’s attorney’s conduct at trial may violate the Act. See Am Prop. Holding Corp., 350 NLRB 998, 1042 (2007).

III. Argument

Counsel for the Company threatened discipline against Mr. Muench for engaging in union activity and testifying at trial. The Company argues that its cross examination of Mr. Muench was necessary to examine the reliability of his notes. However, this argument is a pretext. Indeed, based on the admissions elicited by Mr. Muench, the Company already knew that he had taken notes during work time.

On cross examination, Mr. Muench stated that he has a 15 minute break at 9:00 a.m. and a 30 minute lunch break at noon. (Tr. 752). Moreover, Mr. Muench explained that he would sometimes take notes at the time they occurred, and other times a little later, depending on the circumstances. (Tr. 756-57). Importantly, the Judge even stated that taking the notes would take a “very minimal amount of time.” (Tr. 767). Thus, it was clear from the testimony that Mr. Muench had taken notes on work time, but they were of a de minimis duration. As such, the only reason to specifically ask him about taking notes on work time was to intimidate him for engaging in protected activity.

Moreover, the Company’s questions about taking notes during work time were unnecessary to show the circumstances under which the notes were taken. Mr. Muench admitted on cross examination that his notes did not document every task performed by the working supervisor he was observing and that the times he listed were estimates. (Tr. 748, 760). He also admitted that while he was working with tools he would be concentrating on the task at hand. (Tr. 749). Under these circumstances, the Company’s questions about taking notes on work time were duplicative regarding the evidentiary weight of Mr. Muench’s notes. Instead, the only logical purpose behind the Company’s questions was to intimidate Mr. Muench.

Finally, both the Judge and the General Counsel interpreted the Company's questions as a threat. (Tr. 768, 778). Likewise, Mr. Muench felt subjectively threatened by his cross examination by counsel for the Company. Attached as Exhibit 1 is an affidavit of Mr. Muench.

Section 8(a)(4) has an "expansive scope" and is to be construed "liberally." Power Systems, 239 NLRB 445, 447 (1978), enf. denied on other grounds 601 F.2d 936 (7th Cir. 1979); Glover Bottled Gas Corp., 275 NLRB 658, 673 (1985). Indeed, the Board "should be required to utilize every resource at its command to protect witnesses...who have been placed in jeopardy because the Board has required them to appear and give testimony." Pedersen v. NLRB, 234 F.2d 417, 420 (2nd Cir. 1956). This includes the protection of witnesses like Mr. Muench from retaliation or the threat of retaliation.

IV. Conclusion

By threatening Mr. Muench with discipline for taking notes during working time, the Company violated Sections 8(a)(3) and (a)(4) of the Act. As such, by granting Judge Sandron did not abuse his discretion by permitting the General Counsel to amend its complaint at trial. The Company's request for special permission to appeal should be denied.

Respectfully submitted,

/s/ Michael A. Evans
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CERTIFICATE OF SERVICE

This is to certify that service of the above and foregoing has been mailed via UPS overnight on October 3, 2018 and sent via email on October 11, 2018 to the following parties:

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